

BULLETIN No. 1-2010

SUBJECT: Ex Parte Communications

SERVICE RELATIONSHIP: Commission Zoning Review

DATE: February 18, 2010

Commission Staff Policy and Standards of Conduct Related to *Ex Parte* Communications

By ordinance and practice, the Planning Commission staff is called upon to provide professional opinions on both petitions for zoning relief and text amendments to the zoning code. During this process Commission staff members are often contacted by interested parties – proponents as well as opponents – who ask about zoning cases or want to provide information concerning them. In these situations staff must sometimes tell an interested party that they cannot discuss the case because such a discussion may represent an *ex parte* communication and be in violation of the Commission’s code of ethics and professional conduct. Since most people may not be familiar with the concept of *ex parte* communications, we felt that it might be useful to both the public and Commission staff to provide a short explanation.

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Ex Parte Communications

Generally, and as the literal translation of the term indicates, *ex parte* communications are one-sided ones. They may be presented as being “off the record” because they are not recorded as part of the official record of consideration and decision.

As they affect the Planning Commission’s staff, they most often involve a contact that a member of the staff might have with a “party involved, or potentially involved, in a matter before the planning commission outside of the public hearing process.”¹ *Ex parte* contacts are troublesome

¹ Dale, C. G. (2008). Revisiting *ex parte* contacts, *Planning Commissioners Journal*.

because they can present difficult ethical and due process problems. This is because when a Commission staff member engages in such a one-sided discussion of a matter under review, it does not provide the other side with an opportunity to state their case, and occurs outside of the public forum where the matter will be openly addressed.

The petitioning for zoning relief or a recommendation to amend a zoning ordinance involves a series of steps intended to provide due process so that all of the interested parties have an opportunity to be fairly heard, disclose all information relevant to a decision, and even challenge the evidence provided when appropriate. This information and discussion becomes part of the public record upon which the case is decided. Since an ex parte communication is not part of the public record, it is unavailable to any court or other public body that might be called upon to review the decision or interpret it.

The question of whether or not an ex parte communication creates legal problems is a complicated one. As Dale notes:

...some lawyers will argue that ex parte contacts do not create legal problems. Some will even argue that when planning commissions are providing advice to elected officials on matters such as zoning map amendments, they are acting in a “legislative” and not a “quasi-judicial” capacity, and that ex parte prohibitions do not necessarily apply.²

But aside from due process considerations, the avoidance of ex parte communications is also important for transparency. As one planner remarked concerning such contacts, “...there is nothing more frustrating for the losing party than to have the impression that the other side prevailed through the use of ‘back door’ politics.”³ Such contacts give the appearance of undue influence and favoritism that affect the rights of others to equally comment. Giving the impression that contacts outside of the established, open process affected the results of the process attacks both staff credibility and integrity. So even if an ex parte contact is not explicitly prohibited, it should be avoided.

Ex Parte Communication and the Commission’s Code of Ethics and Professional Conduct

The Springfield-Sangamon County Regional Planning Commission’s *Code of Ethics and Professional Conduct* touches on ex parte communications in several different ways. For example, and related to the principle of responsibly serving the public’s interest, the code calls for Commission staff to “deal fairly and evenhandedly with all participants in the planning process.” As part of the principle to responsibly serve the Commission’s interest, the code notes that staff shall “avoid a conflict of interest or even the appearance of a conflict of interest in carrying out our assignments and duties”, “shall not, as public officials or employees, engage in private communications with planning process participants if the discussions relate to a matter over which we have authority to make a binding, final determination if such private communications are prohibited by law or by agency rules, procedures, or custom”, and “not engage in private discussions with decision makers in the planning process in any manner prohibited by law or by agency rules, procedures or custom.”

² Dale, C.G. (2008).

³ Dale, C.G. (1993). Ex-parte contacts, *Planning Commissioners Journal*.

Ex parte communications can violate those requirements, and for this reason the Planning Commission staff seeks to avoid them.

When an Ex Parte Communication Occurs

As the quotation noted above concerning the legality of ex parte contacts indicates, there may be no “bright line” that a Planning Commission staff member can call upon to identify an inappropriate ex parte contact. However, there are some guidelines to consider.

An ex parte contact involves some *communication*, be it a telephone call, conversation, letter, memoranda, or email, that is “off the record”, as it is not recorded in any public or official way and therefore available to all parties. It might involve a site visit or tour if such is not made available to all interested parties, and can even occur in a public meeting if other parties to the proceeding do not have notice of it and have no opportunity to participate in the communication.

They also relate to the *merits* of a matter under review. A simple question concerning the zoning code would most likely not result in an ex parte communication. A question from a proponent concerning the scenarios under which staff would recommend a variance for a specific project for which a zoning petition has been submitted, or in which an opponent wants to “fill you in” on issues related to the project, likely would.

This gets to another aspect of a probable improper ex parte communication: the matter is *pending or under review*. If a matter is not under review, no staff opinion concerning a particular case is involved. Once a matter enters the process, due process considerations associated with ex parte contacts must be considered. For policy purposes, the Planning Commission *minimally* considers a request for zoning relief to be under review when a petition for relief has been filed with the appropriate zoning office, and considers a text amendment to be under review when the relevant municipal legislative body has referred it to a zoning board for review and recommendation.

If Commission staff members are confronted with a situation that in their judgment might result in an ex parte communication, it would be prudent not to engage in it. That may mean, “...telling people who contact you that you cannot talk to them about a matter pending before the commission, while encouraging them to come to the ...meeting to ask their questions or give their opinion.”⁴ Remember that the purpose of addressing ex parte communications is not to reduce the amount or relevant information and evidence being considered by the zoning board or municipal legislative body, but to ensure that this information or evidence is equally available to all interested parties.

Handling an Ex Parte Communication

Ex parte contacts are not always prohibited and cannot always be avoided. Commission staff members live in the community. We hope that staff members are active in the community, and believe that their knowledge of the community and involvement with it is helpful in understanding the community and its needs, hopes and interests. This means that Commission staff members are often in contact with individuals that have a direct or indirect interest in a matter under consideration.

⁴ Dale (2008). P. 7.

On occasion staff may find that it is simply impossible to avoid all contacts concerning a matter under review. When such an occasion arises, Commission staff members are advised to make any substantive information or facts received concerning a matter under consideration part of the public record “so that it can be available for consideration or challenge by all interested parties.”⁵

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⁵ Dale, C. G. (1993).